

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

THE STATE,

MAR 20 2014

RESPONDENT SC Court of Appeals

V.

DERRINGER YOUNG,

APPELLANT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2014-UP-088

PETITION FOR REHEARING

On March 5, 2014, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Young, No. 2014-UP-088 (S.C. Ct. App. filed Mar. 5, 2014). Appellant files this petition for rehearing pursuant to Rule 221(a) in light of the significant points overlooked and/or misapprehended by this Court in arriving at the opinion.

Appellant raised two issues before this Court; however, Appellant seeks rehearing only as to this Court's opinion concerning the first issue presented. Specifically, Appellant asserted that the trial court erred in refusing to sustain Appellant's objection to and declare a mistrial based upon the prosecutor's closing argument that Appellant threatened three witnesses when no evidence in the

record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Appellant's right to due process. This Court rejected Appellant's argument by citing to State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010) and State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010). The series of parentheticals explain that a trial judge must exercise sound discretion in handling a motion for mistrial and that such motions should be granted only when absolutely necessary following a showing of error and prejudice. The parentheticals further explained although improper comments do not automatically require a reversal if they are not prejudicial, the solicitor's closing argument must not appeal to the personal biases and emotions of the jury and must stay within the record. Finally, the parentheticals referred to errors in closing arguments being harmless when overwhelming evidence of guilt is shown.

Petitioner respectfully requests this Court rehear the matter to address the important factual points overlooked or misapprehended in the opinion. Without question, the prosecutor argued facts not in evidence resulting in prejudice to Appellant when he indicated that two witnesses did not appear for trial and one witness feigned memory loss because of threats by Appellant. The record contained no evidence of threats by Appellant to those witnesses or any evidence that would permit a reasonable inference of such.

During his closing argument, the prosecutor argued to the jury that Appellant had threatened witnesses.

And let me talk about three people who saw this happen: Joshua Crider, Shemera Brown, and Renardo Smalls. Is there a reason - - is there a reason why Renardo Smalls got up on that stand and told you he didn't remember what happened that night? Is there a reason for that? There is a reason for that, and the reason is right here [indicates]. Is there a reason why Shemera Brown has cooperated with police from day one and has not shown up for this trial this week? Is there a reason for that? That reason is right here [indicates]. Is there a reason why Danny Agerson cooperated with the police from the very beginning - - .

R. 332, l. 23 – R. 333, l. 9. Immediately, Appellant objected to the prosecutor's improper closing argument. R. 333, ll. 10-11. However, the trial judge overruled the objection. Thus, the prosecutor continued with his line of argument:

Is there a reason why Danny Agerson is not here this week and he's cooperated with the police? That reason is right here [indicates].

Joshua Crider, Danny Agerson, Shemera Brown, and Renardo Smalls have all see[n] first hand with their eyes what this man is capable of. Joshua Crider came in here. He's locked up. [Appellant] can't get to him. He's locked up. He's in jail.

R. 333, ll. 16-23.

Appellant also moved for a mistrial based upon the prosecutor's improper closing argument wherein he told the jury that witnesses did not appear for trial because Appellant had threatened them. R. 357, ll. 2-7. Appellant argued the comments were improper, shifted the burden to Appellant to deny any threats, and infected the trial with unfairness and violated due process. Appellant further explained that the prosecutor's closing argument was prejudicial based upon the testimony of Clayton, who claimed Appellant threatened him at the detention center. R. 357, ll. 7-18.

The prosecution's primary witness, Joshua Crider, a bouncer at Club 843, claimed he saw Appellant shoot Danny Agerson outside the club. Crider explained that Agerson had been in a physical altercation inside the club and had been forced to leave as a result. However, the fight continued outside the club with Agerson and his friends attacking the security officers. R. 24, ll. 1-19; R. 61, ll. 3-5; R. 29, ll. 2-23; R. 30, ll. 18-21; R. 63, ll. 20-23; R. 64, l. 6 – R. 66, l. 10; R. 31, l. 17 – R. 32, l. 10; R. 66, l. 24 – R. 68, l. 10. The scene quickly turned into "an all-throw-out brawl." R. 30, l. 21 – R. 31, l. 2. Somehow, in this mayhem, Crider saw Appellant shoot Agerson, in the lower right abdomen. R. 34, ll. 3-9; R. 35, ll. 11-13; R. 36, ll. 21-23; R. 37, ll. 1-3; R. 69, l. 14-17; R. 75, ll. 10-15. Crider further claimed that Appellant got into an older model car, possibly a

Mercury Grand Marquis, in which a black male and female were waiting. Appellant exited the vehicle, exchanged words with another man who was standing in front of the car and then shot the man. R. 34, ll. 10-21; R. 37, ll. 11-14; R. 39, ll. 10-15; R. 39, ll. 17-25. Appellant, his friend, and the friend's girlfriend then left the club. R. 41, ll. 15-21.

Although Crider's testimony at trial matched some of the physical evidence from the scene, interestingly, his 911 call during the actual shootings and his statement to officers during the early morning hours did not match the physical evidence or his trial testimony. R. 46, ll. 18-25. For example, Crider testified at trial that Appellant shot Agerson in the lower abdomen, but on the 911 call, he said the shot was to the chest. R. 47, ll. 1-4. Additionally, Crider testified only three people were in the car in which Appellant left the scene; however, on the 911 call, he stated there were four people in the car. R. 47, l. 25 – R. 49, l. 3. Crider testified that after Appellant left he heard no more shots. R. 49, ll. 4-6; R. 76, ll. 11-22. On the 911 tape, he told authorities he continued to hear gunshots. R. 70, l. 15 – R. 71, l. 8. Further, Crider told the responding officers Appellant was traveling in a Lincoln, rather than a Mercury as his trial testimony indicated. R. 50, ll. 17-21. Crider testified that when officers took him to the scene of a traffic stop, where he identified Appellant as the shooter, he saw that the car was not a Lincoln, but was a Mercury. R. 52, ll. 11-24.

Crider testified that he received no promises for his testimony during the prosecution's questioning of him, on cross-examination, Crider admitted that he hoped to receive a downward departure in federal court in exchange for his testimony against Appellant.¹ Crider admitted the

¹ Crider had been convicted of conspiracy to sell cocaine first degree and conspiracy to commit money-laundering in federal court. R. 73, ll. 23-25. The record was unclear as to how much time Crider received for those federal convictions. Appellant stated Crider received eighty years or forty years. The prosecution was unsure of the exact number, but considered it a "big sentence." R. 14, ll. 1-10. In addition, Crider had a 2004 conviction for pointing and presenting a firearm. R. 22, l. 22 – R. 23, l. 1.

prosecutor agreed to write a letter explaining his cooperation and testimony. R 58, ll. 10-13; R. 73, ll. 14-22; R. 77, l. 15-22. Needless to say Crider's testimony was highly suspect due to his inconsistent statements, the chaotic scene during which he allegedly witnessed the shooting, and his motive to lie to receive a reduction in sentence.

Renardo Smalls, Appellant's cousin, testified that he and Appellant went to Club 843 in 2007. R. 83, ll. 7-10; R. 83, ll. 12-25; R. 84, ll. 13-15. The pair went their separate ways in the club, and Smalls got drunk. R. 84, l. 18 – R. 85, l. 11. He recalled people fighting in and out of the club and going to his car during the fighting. R. 85, ll. 12-14. R. 86, ll. 1-3. Smalls was unable to remember the kind of car he was driving at the time. R. 84, ll. 3-4. Smalls also did not remember hearing gunshots and did not remember talking to police due to his intoxication. R. 86, ll. 6-22.

When the prosecution presented him with a statement purportedly made by him to police, he admitted his signature appeared on the typed statement, but he had no independent recollection of the events of that night. R. 87, ll. 10-22; R. 88, l. 23 – R. 89, l. 5; R. 91, l. 5 – R. 92, l. 9; R. 104, l. 22 – R. 105, l. 5. Thereafter, the prosecutor introduced Smalls' statement into evidence and published it to the jury. According to the statement, Smalls heard a gunshot. He then saw Appellant and a female walking towards his car. He also saw another man walking towards them. He described the other guy as the one Appellant shot. He also claimed that Appellant threw the gun out the window of the car. R. 101, l. 4 – R. 102, l. 24.

The prosecutor asked Smalls if he were scared or nervous about testifying, and he responded negatively. R. 103, ll. 11- 14. When the prosecutor asked if anyone had talked to him or communicated anything to him about testifying, Appellant objected on the bases of hearsay and relevance. Then a bench conference, which was not recorded, transpired. Ultimately, the judge sustained Appellant's objection to the testimony. R. 103, l. 15 – R. 104, l. 2.

Officer George Gomes arrived at the scene of Club 843 to investigate the alleged shooting, Agerson had been transported to the hospital already. R. 214, ll. 13-23. Eight days later, Gomes met with Agerson for the first and only time. R. 215, ll. 7-8. Gomes obtained a written statement from Agerson, but had no other contact with Agerson. R. 215, ll. 13-20. In preparing for the trial, Gomes and the prosecution attempted to locate Agerson, but were unable to do so. R. 216, ll. 4-25.

Gomes testified that he also interviewed Shemera Brown, who identified herself as Appellant's girlfriend. R. 217, ll. 9-20. Brown provided a statement and was cooperative in the investigation. R. 218, ll. 5-15. According to Gomes, Brown told officers where Appellant threw the gun out the car after the alleged shooting. R. 218, l. 16 – R. 219, l. 4. Gomes further testified that the police department and the prosecuting agency had been in contact with Brown and met with her on several occasions, including a meeting during the latter part of the week before the trial. R. 219, ll. 10-23. However, Gomes was unable to locate Brown for the trial. R. 219, l. 21- R. 220, l. 3.

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The South Carolina Supreme Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the

improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

“Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.” Donnelly, 416 U.S. at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)). The South Carolina Supreme Court addressed this issue in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey's drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their involvement. Id., at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey “a pretty intimidating man.” He further argued Mincey “must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we're guilty of this.” Id. (emphasis in original). Concerning the confidential informant in the case, the prosecutor stated “Maybe she's intimidated by Elijah. She's got children. She lives down there too.” Id., at 358, 444 S.E.2d at 511. The Court held the prosecutor's argument was improper and trial counsel was ineffective for failing to object. “References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats.” Id. (citing State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by the Court, Mincey's defense was that he was not involved in the drug transaction. The prosecutor's implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor's argument was improper because “[t]here was, in fact, no evidence that Mincey intimidated any of the witnesses.” Id., at 358, 444 S.E.2d at 511.

The South Carolina Supreme Court granted a defendant a new trial where a prosecutor's closing argument, which “misstated the law by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a

much lighter sentence of an acquittal.” Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id., at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant’s guilt because the prosecutor’s argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id., at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, the South Carolina Supreme Court held a defendant was entitled to a new trial based upon the solicitor’s improper closing argument. The defendant’s attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id., at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors’ time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant’s attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said “the very same thing” that the officer presented said. Id., at 168, 607 S.E.2d at 74.

The Court recognized that improper argument includes vouching for a witnesses and initiating argument about the testimony of absent witnesses. Id., at 169, 607 S.E.2d at 75. Additionally, the Court recognized that the defendant “‘opened the door’ to some response from the solicitor” based on is closing argument concerning the absence of witnesses. Id., at 170, 607 S.E.2d

at 75. The Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id., at 170, 607 S.E.2d at 75-76.

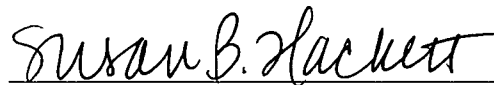
In a recent capital case, the South Carolina Supreme Court found a solicitor's closing argument to require reversal where the solicitor informed the jury that if the death penalty were not returned, then it would be the equivalent of "declaring an "open season on babies in Lexington County.'" The only purpose of such a statement was to inflame the jury. Additionally, the prosecutor told the jury repeatedly that he "expected" the jury to return a death verdict, which was in direct contradiction of case law. Finally, the prosecutor ended his argument by producing a large black shroud and draping it over the baby's crib, which he wheeled into the courtroom in a staged funeral procession. State v. Northcutt, 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882(2007).

The closing argument presented by prosecutor in the instant case was clearly improper. Repeatedly and dramatically, the prosecutor pointed to Appellant as the reason why two witnesses did not appear and one allegedly feigned a faulty memory. The prosecutor further exacerbated this improper argument by saying that the only witness to testify was willing to do so only because Appellant could not get to him because the witness was safe in jail. Thus, the prosecutor's argument was clear: Appellant threatened witnesses with violence to intimidate them into not testifying. The record contained no evidence of threats against those witnesses, much less threats by Appellant against the witnesses. The trial judge overruled Appellant's objection to the improper argument signaling to the jury that what the solicitor claimed was true and accurate. The trial judge failed to instruct the jury to disregard the prosecutor's improper argument; therefore, no curative instructions or corrective action was taken by the trial judge, which has been viewed as curing improper arguments in other cases. The evidence against Appellant was not overwhelming. The main witness against Appellant was highly motivated to testify falsely in light of his criminal

charges, and his testimony differed from his 911 call significantly. No physical or forensic evidence connected Appellant to the crime. Crider's credibility was seriously undermined by the circumstances of the scene, his inconsistent statements, and his motive to lie to assist himself. Although Smalls testified, he had very little memory of what transpired three years earlier at a nightclub while he was intoxicated. In light of this paucity of evidence, the prosecutor acted improperly, and desperately by informing the jury that Appellant had threatened witnesses to discourage their cooperation or feign memory loss. The prosecutor had no evidence at all to support such an improper argument. Allowing the prosecution's argument to stand would be a "prostitution of justice." See Mincey, 314 S.C. at 358, 444 S.E.2d at 511(citing State v. Rogers, 96 S.C. 350, 352, 80 S.E.620, 621 (1914)(holding that introduction of evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant to the tampering would be a "prostitution of justice").

In conclusion, Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR based upon the above-listed points overlooked or misapprehended by this Court in its unpublished opinion affirming Appellant's convictions and sentences.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 20th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

RECEIVED

MAR 20 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

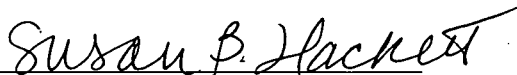
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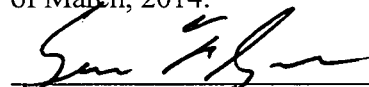
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derringer Young, #309944, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 20th day of March, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.